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No. 95-1410

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

THOMAS J. DART, et al.,

Petitioners

v.

W.A. DART, et al.

Respondents

On Petition For A Writ of Certiorari
To The Supreme Court Of
The State Of Michigan

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BERGER & MONTAGUE, P.C.
Merrill G. Davidoff
Counsel of Record
Jerome M. Marcus
John R. Taylor
1622 Locust Street
Philadelphia, PA 19103
Telephone: (215) 875-3084

CRAVATH, SWAINE & MOORE
David Boies
Thomas E.L. Dewey
WorldWide Plaza
825 Eighth Avenue
New York, NY 10019
Telephone: (212) 474-1000

Charles Alan Wright
727 East 26th Street
Austin, TX 78705
Telephone: (512) 471-7188

Counsel for Petitioners
Thomas J. Dart and
Judith C. Dart

PACKARD PRESS® / APPELLATE DIVISION, 1617 JFK BOULEVARD, PHILA., PA 19103 (215) 563-9000

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I. INTRODUCTION.

Except to the extent that it conveys a sense of the rancor which has afflicted the underlying litigation in the Michigan probate court, Respondents' statement of the case obscures more than it reveals. For example, by attempting to challenge Petitioners' motives in bringing the Federal RICO Action (Opp. at 1-2), Respondents ignore the fact that the Constitution places no burden of justification on those who wish to exercise their Constitutional rights. Here, Petitioners elected to litigate their federal RICO claims in a federal district court.[1] Their right to do so is explicitly conferred by Congress[2], and is protected against state court attacks by the Supremacy Clause of the United States Constitution. *Donovan v. Dallas,* 377 U.S. 408 (1964). Petitioners' motives in wishing to litigate in a federal forum are no more subject to question than are the motives of any citizen in exercising any constitutionally protected right.[3]

Nor is there any basis for Respondents' implication that there is something impermissible about simultaneously pursuing multiple lawsuits in different forums, even where the factual and legal issues substantially overlap. As this Court held in *Princess Lida of Thurn and Taxis v. Thompson,* 305 U.S. 456 (1939):

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1. Contrary to Respondents' accusation, Petitioners' did ***not*** attempt to "conceal" the fact that, coincident with the filing of the Federal Action, Petitioners also asserted a RICO claim in the Michigan Action. *See* Pet. App. at 4a (letter dated July 14, 1994 from Petitioners' counsel to Judge Donald Owens of the Michigan probate court).

2. *See* 18 U.S.C. §1964(c) and 28 U.S.C. §1331.

3. As this Court noted in *General Atomic Co. v. Felter,* 434 U.S. 12, 17 (1977):

"... *Donovan* presented as compelling a case as there could be for permitting a state court to enjoin the further prosection of vexatious federal proceedings. It involved a suit filed in federal court after the issuance of a final state-court judgment deciding the principal claims pressed in the federal action adversely to the federal plaintiffs. Moreover, as the *Donovan* opinion pointed out, the pendency of the federal action had the effect of rendering the state-court judgment ineffective ... We nevertheless overturned the state-court injunction."

> Certain it is, therefore, that if both courts were to proceed they would be required to cover the same ground. This of itself is not conclusive of the question of the District Court's jurisdiction, for it is settled that where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other.

305 U.S. at 465-466 (citations omitted).

Throughout their Opposition, Respondents also attempt to obscure the critical fact that the September 16, 1994 Contempt Order was the first adjudication by the probate court that Petitioners were enjoined from litigating a federal claim in federal court. As previously explained (Pet. at 3-4, 6; Pet. App. at 1a), the October 15, 1994 Anti-Suit Injunction only purported to enjoin new actions which asserted certain enumerated claims which had previously been asserted in the Michigan Action and the Florida State Court Suit.[4] At the time the Injunction was entered, no federal RICO claim had been asserted in either action. Thus, when it subsequently acted (by means of the September 16, 1994 Contempt Order) to prevent Petitioners from litigating their federal RICO claims in the subsequently-filed Federal Action, the probate court necessarily expanded the scope of its injunction. Perhaps the probate court implicitly recognized this fact when it deferred sentencing until October 14, 1994, in order to give Petitioners an opportunity to "purge" themselves of the asserted "contempt."

In light of this fact, it is inaccurate for Respondents to characterize the present appeal as a "collateral attack" on the

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4. The Anti-Suit Injunction did ***not*** on its face bar all claims arising from the same nucleus of fact as the claims asserted in the Michigan Action and the Florida State Court Suit. Pet. App. at 1. In fact, the Injunction expressly allowed Petitioners to proceed in the Florida State Court Suit on their claim for damages for emotional distress, even thought the acts giving rise to that claim were exactly the same as the facts and deeds at issue in the rest of the complaint in the Florida State Court Suit and in the petitions in the Michigan Action.

Anti-Suit Injunction, because the order entering the Injunction did not adjudicate Petitioners' right to litigate federal RICO claims in federal court. That question was not presented until Petitioners later filed their Federal Action. See Section II.C., *infra.*

The Court should grant review of the Contempt Order, because Respondents have failed to identify any procedural barrier to review, and because the case raises important legal issues regarding the respective powers of the state and federal courts.

II. RESPONDENTS HAVE IDENTIFIED NO PROCEDURAL BARRIERS TO REVIEW.

A. The Present Appeal Is Not Moot, Because The Issues Presented Are Live, And Petitioners Have A Legally Cognizable Interest In The Outcome.

In general, a case becomes moot only "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Murphy v. Hunt*, 455 U.S. 478, 481 (1982), *citing United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 386 (1980), and *Powell v. McCormack*, 395 U.S. 486, 496 (1969). The present appeal is not moot, because its outcome will effectively determine whether Petitioners can litigate their federal claims in a federal forum.

As previously explained (Pet. at 7-8), Petitioners avoided imprisonment in this case only by dismissing without prejudice the Federal Action by means of a Notice of Stipulated Dismissal filed with the United States District Court for the Middle District of Florida on October 18, 1994. Pet. App. at 59a. The Notice of Dismissal was subject to and incorporated by reference the terms of a Stipulated Order entered by the Michigan probate court on October 17, 1994. Pet App. at 56a.

The Stipulated Order explicitly preserves Petitioners' rights to resume prosecution of their federal RICO claims in

federal court if the Contempt Order is reversed on appeal.[5] If this Court grants certiorari and reverses the contempt ruling, Petitioners will exercise their rights by promptly refiling the Federal Action. If this Court denies review or sustains the Contempt Order, Petitioners will be effectively foreclosed from litigating their federal claims in a federal forum. Under these circumstances, it makes no sense for Respondents to argue that nothing turns on the outcome of this Petition.

In the cases cited by Respondents — *In re Grand Jury Subpoena,* 955 F.2d 670 (11th Cir. 1992) and *In re Hunt,* 754 F.2d 1290 (5th Cir. 1985) — mootness was found because the contempt apparently was purged in a manner that left no live case or controversy for adjudication.[6] By contrast, courts have refused to find mootness, and have exercised their appellate

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5. The Stipulated Order provides in relevant part as follows:

> 2. [Petitioners'] dismissal [of the Federal Action] shall be without prejudice as to all defendants in the Federal Action and the statute of limitations shall be tolled as to the claims in the complaint filed in the [Federal Action] on or about July 8, 1994 from the date of such dismissal until 15 days after all appellate review in the courts of Michigan of the Injunction and the Contempt Order shall have been completed, including the decision on any application for appellate review (by appeal, certiorari, or otherwise) to the United States Supreme Court.
>
> 3. Neither the consent of the parties to entry of this Order nor entry of this order shall be deemed to waive any claim or defense, procedural or substantive, legal or equitable to the claims in the [Federal Action] (including the defense that such claims are subject to arbitration).

Pet. App. at 57a.

6. In *In re Grand Jury Subpoena,* the contemnor had purged by producing certain documents pursuant to a subpoena. Any prejudice arising from the disclosure of the documents in question could not be undone by reversal of the contempt order on appeal. Similarly, in *In re Hunt,* the contemnor purged his contempt by dismissing certain specified legal actions. There is no indication that the dismissals were without prejudice, or that any court order preserved the contemnor's ability to re-file the dismissed actions depending on the outcome of any appeal. Indeed, respondents characterize the contemnor in *In re Hunt* as having "abandoned the litigation." Opp. at 6. Under the circumstances presented in that case, the outcome of any appeal would have been without any practical effect for the appellant.

jurisdiction, where a live case or controversy survives purgation of the contempt. For example, in *Thomassen v. United States,* 835 F.2d 727 (9th Cir. 1987), one Thomassen purged his contempt by complying with an order to pay an award of attorneys' fees to the government. Because Thomassen sought a return of the fees in question, the appellate court rejected the government's contention that the appeal was moot:

> We recognize also that the purging of the contempt ordinarily renders the controversy moot. . . . This doctrine stems from the fact that in most instances the court has no remedy to afford the party contesting the now purged contempt. Thomassen, however, seeks the return of the attorney fee award he was forced to pay to secure his release from prison. Hence, we are presented with a live controversy which is inextricably intertwined with the contempt issue and we are capable of providing relief.

Id., 835 F.2d at 731-32.[7]

Similarly, in *Rhode Island Hosp. Trust Nat'l Bank v. Howard Communications Corp.,* 980 F.2d 823 (1st Cir. 1992), the district court made a finding of contempt and directed the contemnors to reimburse their adversaries for certain legal expenses. *Id.,* 980 F.2d at 827. The contemnors purged the contempt "conditionally" by paying the fees in question, subject to a request that the funds be placed in escrow pending the outcome of an appeal. *Id.,* 980 F.2d at 829, n.9. Since the resolution of the appeal would effectively determine whether the appellant was entitled to a return of the funds from escrow, there was a live case or controversy, and the appeal was not moot. *Id.*

Like the appellants in *Rhode Island Hosp. Trust Nat'l Bank,* Petitioners' satisfaction of the contempt sanction was conditional, and Petitioners have effectively preserved their

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7. *See also Davies v. Grossmont Union High School District,* 930 F.2d 1390, 1394 (9th Cir.), *cert. denied,* 501 U.S. 1252 (1991) (court not deprived of appellate jurisdiction notwithstanding fact that appellant purged contempt by complying with order to resign from office; a live controversy was presented by the fact that appellant sought reinstatement on appeal, and by the fact that the contempt order would effectively foreclose appellant from specified employment in the future).

rights in the event that the Contempt Order is reversed on appeal. Because Petitioners have a very real stake in the outcome of the present appeal, the appeal cannot properly be characterized as moot.

B. The Contempt Ruling Is Ripe For Review.

Respondents' contention that the Contempt Order does not constitute a final appealable order is belied by the fact that both the Ingham County Circuit Court and the Michigan Court of Appeals denied Petitioners' appeals on the merits, and not based on the asserted absence of any final appealable order. Pet. at 8; Pet. App. at 63a, 82a. Neither court would have reached the merits if it believed that jurisdiction was foreclosed by the absence of a final appealable order.[8]

As previously explained (Pet. at 8-9, n.4) Petitioners will have no meaningful opportunity for further review of the Contempt Order in the Michigan courts. Even assuming that the Michigan Supreme Court would be inclined to review the Contempt Order following the entry of a final judgment in the underlying Michigan Action, and even assuming the Michigan Supreme Court were to reverse the Contempt Order at that time, Petitioners would still be irreparably deprived of their right to litigate their federal claims in federal court. The entry of an adverse final judgment in the Michigan Action would collaterally estop Petitioners from relitigating any common factual issues in a re-filed Federal Action.

Moreover, pursuant to the terms of the October 17, 1994 Stipulated Order, the limitations period on Petitioners' federal RICO claim is tolled only until 15 days after Petitioners have exhausted all appeals of the Contempt Order. When Petitioners filed the Federal RICO Action, there were arguably only

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8. There is no merit to Respondents' argument (Opp. at 7) that the Contempt Order is not appealable due to an alleged absence of sanctions. "[T]he general rule is that only a citation for contempt, not the imposition of sanctions, is necessary for appellate review." *In re Three Grand Jury Subpoenas* 847 F.2d 1024, 1028-28 (2nd Cir. 1988) (analyzing cases). *See also, In re Grand Jury Subpoena, etc.*, 784 F.2d 116, 118 (2nd Cir. 1986); *National Super Spuds, Inc. v. New York Mercantile Exchange*, 591 F.2d 174, 180 (2nd Cir. 1979).

three days remaining before the applicable limitations period would run. See Pet. at 4. Accordingly, Respondents could be expected to argue that the limitations period on Petitioners' federal RICO claims would expire 18 days after any denial of the present Petition, and Petitioners could be forever foreclosed from litigating these claims in a federal forum.[9]

C. The Present Appeal Does Not Involve A Collateral Attack On The October 15, 1993 Anti-Suit Injunction.

The Anti-Suit Injunction only purported to enjoin the prosecution of actions asserting certain enumerated claims which had been previously asserted in the Michigan Action and in the Florida State Court Suit. The enumerated claims did ***not*** include a federal RICO claim. The Probate Court had no occasion to consider whether Petitioners could prosecute other actions asserting federal RICO claims until Petitioners

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9. As noted (Pet. at 8-9, n.4), review in this case is supported by this Court's decision in *General Atomic Co. v. Felter,* 434 U.S. 12 (1977), where this Court, ruling on a petition for review of a state-court anti-suit injunction, specifically noted that "there is no final state court judgment, since [the underlying state court action] has not yet been tried," but nevertheless granted certiorari because the petitioner's "opportunity to fairly litigate the various claims arising from this complex action would be substantially prejudiced if the injunction were allowed to stand." *Id.,* 434 U.S. at 17-18. Respondents try to distinguish *General Atomic* on the ground that the focus of review in that case was the underlying injunction, rather than the contempt order. Citing to 28 U.S.C. §1292(a)(1), Respondents assert that injunctions and writs of prohibition "are reviewable on wholly independent statutory grounds not applicable here." Opp. at 7.

Respondents' effort to differentiate between the Injunction and the Contempt Order for purposes of the *General Atomic* analysis is not persuasive. Petitioners note that this Court's review of state court judgments is governed by 28 U.S.C. §1257, and not §1292(a)(1), and §1257 does not differentiate between injunctions and contempt orders. To the extent that §1292(a)(1) has any bearing on this Court's jurisdiction (as Respondents suggest), the Contempt Order would be independently appealable as an order modifying an injunction, because, as discussed, the Contempt Order represented the Probate Court's first pronouncement on the permissibility of bringing a federal RICO action, and substantively expanded the scope of the Anti-Suit Injunction. *See, United States v. O'Rourke,* 943 F.2d 180, 186 (2d. Cir. 1991); *Gregory v. Depte,* 896 F.2d 31, 34 (3d Cir. 1990); *Western Water Management, Inc. v. Brown,* 40 F.3d 105, 108 n.1 (5th Cir. 1994).

later asserted such a claim in the Federal Action. The Contempt Order was the Probate Court's ***first*** ruling concerning Petitioners' freedom to file other actions asserting federal RICO claims, and it is wholly appropriate for Petitioners to seek review of that ruling herein.

Moreover, it is impossible to imagine how Petitioners could have sought appellate review of the Anti-Suit Injunction as it bears on a federal RICO claim, since no such claim was pending at the time the Injunction was entered, and since the Injunction does not on its face extend to such claims. Had Petitioners attempted to attack the Injunction upon its issuance for denying them the right to prosecute an entirely hypothetical federal claim, the appellate courts properly would have refused to consider such a question. The collateral bar rule has no application here, where no adequate or effective remedies existed for the orderly review of the challenged ruling. *In re Novak*, 932 F.2d 1397, 1401 (11th Cir. 1991), *citing United States v. Dickinson*, 465 F.2d 496, 511 (5th Cir. 1972).

III. THE PETITION PRESENTS ISSUES WORTHY OF THIS COURT'S REVIEW, BECAUSE THERE ARE GENUINE CONFLICTS REGARDING THE APPLICABLE LEGAL PRINCIPLES.

Contrary to Respondents' argument, the instant appeal involves genuine conflicts regarding important legal principles affecting the respective powers of the federal and state courts. The parties agree that Petitioners' ability to proceed with the Federal Action turns on whether jurisdiction in that Action is *in personam* (in which case Petitioners could proceed consistent with *Donovan* and *General Atomic*) or *in rem* or *quasi in rem* (in which case Petitioners might be barred from proceeding under *Princess Lida*). Beyond this point in the analysis, the parties diverge.

Petitioners submit that it was improper for the Michigan courts to attempt to characterize the jurisdictional basis for the Federal RICO Action. Pet. at 15-16. For state courts to attempt this kind of determination is to undermine the supremacy of federal power. Rather, it should fall to the fed-

eral courts to determine the character of the actions brought before them, and to decide whether they should proceed under the abstention principles articulated in *Colorado River Conservation Dist. v. United States,* 424 U.S. 800 (1976).

Princess Lida did uphold a state-court injunction against *in rem* proceedings in the federal court (See Pet. at 15), but that case was decided 57 years ago, before the federal courts had developed doctrines of abstention, and before *Donovan* and *General Atomic* announced a clear rule barring state courts from enjoining federal proceedings. Neither Petitioners nor Respondents have been able to identify any case in the intervening 57 years (other than the present case) in which *Princess Lida* has been construed to allow a state court to use its injunctive and contempt power to compel dismissal of a federal claim in federal court.[10]

Moreover, the Michigan courts substantively erred in concluding that the Federal Action was *in rem* or *quasi in rem.* While the Michigan courts may have claimed that they were basing their analysis on federal law, their conclusions simply cannot be squared with the numerous federal cases holding that federal actions for money damages against trustees for mismanagement and breaches of trust may proceed without affecting a state court's control or supervision of the trust. *See, e.g., Southwestern Bank & Trust Co. v. Metcalf State Bank,* 525 F.2d 140 (10th Cir. 1975); *Rogers v. Girard Trust Co.,* 159 F.2d 239 (6th Cir. 1947); *Powell v. American Bank & Trust Co.,* 640 F. Supp. 1568 (N.D. Ind. 1986); *Mooney v. Fidelity Union Bank,* No. 82-3192, 82-3193 (D.N.J. March 10, 1983); *Beach v. Rome Trust Co.,* 269 F.2d 367, 372 (2d Cir. 1959); *Martz v. Braun,* 266 F. Supp. 134 (E.D. Pa. 1967); *Silberman v. Worden,* No. 87 C 8368, 1988 U.S. Dist. LEXIS 10455 (N.D. Ill. Sept. 15, 1988); *Stewart Sec. Corp. v. Guaranty Trust Co.,* 71 F.R.D.

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10. Neither *Donovan* nor *General Atomic* involved any dispute as to the jurisdictional character of the federal action: the federal action in each case was clearly *in personam.* The issue in each case was ***not*** whether the characterization of the federal action was correct (or which court should characterize the action), but whether the state court could enjoin prosecution of a federal action that was clearly *in personam.* Respondents' reliance on these cases (Opp. at 10) is therefore misplaced.

32, 33 (W.D. Okla. 1976). Even though these cases were discussed at length in the Petition, Respondents have utterly failed to address them.[11]

IV. CONCLUSION.

For the foregoing reasons, and for the reasons set forth in the Petition, the Court should issue a writ of certiorari to review the decision of the Michigan court.

Dated: April 25, 1996

Respectfully submitted,

/s/

CRAVATH, SWAINE & MOORE
David Boies
Thomas E.L. Dewey
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

BERGER & MONTAGUE, P.C.
Merrill G. Davidoff
Jerome M. Marcus
John R. Taylor
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000

Charles Alan Wright
727 East 26th Street
Austin, TX 78705
Telephone: (512) 471-7188

Attorneys for Petitioners

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11. The principal case relied on by Respondents — *Cassity v. Pitts*, 995 F.2d 1009 (10th Cir. 1993) — simply does not support the Michigan courts' conclusion that the Federal Action was in the nature of an *in rem* or *quasi in rem* proceeding. Clearly, the outright voiding of a trust (which was part of the requested relief in *Cassity*) could not be accomplished without an exercise of jurisdiction over the trust. By contrast, Petitioners, as plaintiffs in the Federal Action, sought only money damages which were not specifically identified to any trust or trust assets. Petitioners' Federal Action was clearly *in personam*, and could be fully adjudicated without interfering with the Michigan courts' jurisdiction over the Dart trusts.

Assuming, *arguendo*, that the Michigan courts' interpretation of *Cassity* is correct, then *Cassity* must be seen to conflict with the above-cited cases in the main text. The existence of such an inter-circuit conflict would militate in favor of issuing a writ of certiorari.